

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

Signed

74-2587

B
PP

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETER TERZIAN,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM THE ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

SCOTT P. CRAMPTON,
Assistant Attorney General.

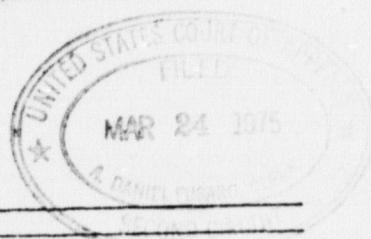
GILBERT E. ANDREWS,
CROMBIE J.D. GARRETT,
ROBERT E. LINDSAY,

Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

JAMES M. SULLIVAN, JR.,
United States Attorney.

JAMES E. CULLUM,
Assistant United States Attorney.



2

TABLE OF CONTENTS

	Page
Statement of the issue presented-----	1
Statement of the case-----	1
Summary of argument-----	4
Argument:	
Section 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.) is an absolute bar to the relief requested and thus the District Court properly denied the motion for a cease and desist order-----	6
A. Introduction-----	6
B. Taxpayer's action does not fall within any of the statutory exceptions to Section 7421(a)-----	8
C. Taxpayer did not establish that he would suffer irreparable harm unless an injunction issued and that the Government could not ultimately establish its claim-----	10
D. Conclusion-----	13
Conclusion-----	14
Appendix-----	15

CITATIONS

Cases:

<u>Alexander v. "Americans United" Inc.</u> , 416 U.S. 752 (1974)-----	10
<u>Bailey v. Drexel Furniture Co.</u> , 259 U.S. 26 (1922)-----	12
<u>Bob Jones University v. Simon</u> , 416 U.S. 725 (1974)-----	10, 12
<u>Brushaber v. Union Pac. R.R.</u> , 240 U.S. 1 (1916)-----	13
<u>Cole v. Cardoza</u> , 441 F. 2d 1337 (C.A. 6, 1971)-----	11
<u>Dodge v. Osborn</u> , 240 U.S. 118 (1916)-----	12
<u>Enochs v. Williams Packing Co.</u> , 370 U.S. 1 (1962)-----	10, 13

Cases (continued):	Page
<u>Pizzarello v. United States</u> , 408 F. 2d 579 (C.A. 2, 1969)-----	12
<u>Sherman v. Nash</u> , 488 F. 2d 1081 (C.A. 3, 1973)-----	10
<u>Westgate-California Corp. v. United States</u> , 496 F. 2d 839 (C.A. 9, 1974)-----	10
 Statutes:	
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 6212-----	8
Sec. 6213-----	8
Sec. 6861-----	9
Sec. 7421-----	6
 Miscellaneous:	
Federal Rules of Appellate Procedure, Rule 30-----	2

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2587

PETER TERZIAN,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court erred in denying taxpayer's motion to restrain lien and levy action undertaken by the Internal Revenue Service pursuant to jeopardy assessments of income tax liability.

STATEMENT OF THE CASE

On March 28, 1972, a four-count indictment was filed in the United States District Court for the Northern District of New York charging Terzian (sometimes referred to hereinafter as taxpayer) with attempted evasion of personal income taxes, in violation of Section 7201 of the Internal Revenue Code of

1/ 1954. (App. 15.) Thereafter, following an initial plea of not guilty and the denial of a motion to dismiss the indictment because of the asserted unconstitutionality of progressive income taxation, taxpayer entered a plea of guilty to one count of the indictment and the remaining three counts were dismissed. (App. 15-16; Br. 1.) 2/ On April 2, 1973, taxpayer was fined \$5,000 and sentenced to a six-month term of imprisonment. (App. 16.) A notice of appeal was filed on April 11, 1973, and, on September 28, 1973, this Court affirmed (483 F. 2d 1400) the District Court's denial of the motion to dismiss the indictment. (Ibid.) Taxpayer then filed a notice of appeal to the United States Supreme Court and a certified copy of the record on appeal was subsequently transmitted to that court on November 8, 1973. (Ibid.) A petition for a writ of certiorari, however, was not filed until February 18, 1975.

1/ "App." references are to the appendix to this brief, which contains a copy of the docket entries in the court below and a copy of an affidavit of Assistant United States Attorney James E. Cullum filed in opposition to taxpayer's Motion for Order to Cease and Desist. Although the pro se appellant has not filed a record appendix as required by Rule 30 of the Federal Rules of Appellate Procedure and Rule 30 of this Court, he has attached to his brief a copy of a Notice of Deficiency as to incomes taxes for the years 1965 through 1968, a copy of his Motion for Order to Cease and Desist, a copy of an order of the United States District Court for the Northern District of New York dated November 28, 1972, and a copy of the order from which this appeal is taken. Reference to these materials will be by document caption.

2/ "Br." references are to appellant's brief in this Court.

On October 7, 1974, taxpayer filed a motion in the United States District Court for the Northern District of New York seeking an order directing the Commissioner of Internal Revenue to cease certain lien and levy action which he had undertaken and to return the proceeds of certain checking accounts.

(App. 16 ; Motion for Order to Cease and Desist.) The motion asserted that the Commissioner had caused tax liens to be filed in the office of the County Clerk of Schenectady County on July 12, 1974, and July 25, 1974, for alleged deficiencies in the payment of income taxes; the Commissioner had caused a notice of levy to be transmitted to the Mohawk National Bank of Schenectady, New York, on September 27, 1974, thereby causing the bank to pay over the amounts on deposit in taxpayer's checking accounts and making it impossible for him to conduct business or to pay his creditors by the use of the accounts; the taxpayer had litigation pending in the Tax Court in regard to the alleged deficiencies in payment of income taxes; taxpayer also had "litigation under consideration by the Supreme Court of the United States under Docket No. 72 CR 103, in regard to the unconstitutionality of progressive income taxation;" and, the actions of the Commissioner were premature, seriously disrupted the conduct

3/ This motion was filed by taxpayer under the docket number assigned to his criminal case.

of business by the taxpayer, and were detrimental to his professional standing in the community. (Motion for Order to Cease and Desist.) Thereafter, an affidavit in opposition to the motion was filed by the United States. (App. 17-18.) The affidavit asserted, inter alia, that a jeopardy assessment of income tax liability had previously been made against the taxpayer; that Section 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.) prohibited the maintenance of all suits for the purpose of restraining the assessment or collection of any tax; and, that the motion had no relationship to the criminal case. (Ibid.) After a hearing on November 4, 1974, an order, dated November 8, 1974, was entered on November 12, 1974, denying the motion on the ground that the court had "no jurisdiction to entertain the motion or to grant the relief requested."^{4/} (App. 16; Order of November 8, 1974.) On November 11, 1974, taxpayer filed a notice of appeal from this order. (App. 16.)^{5/}

SUMMARY OF ARGUMENT

Setting aside all other questions, it is clear that Section 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.) is an absolute bar to taxpayer's motion seeking to restrain

^{4/} Under the date of November 4, 1974, the date of the hearing, Judge Foley noted on the first page of taxpayer's motion that the motion was denied under the provisions of Sections 7421 and 7422 of the Internal Revenue Code of 1954 (26 U.S.C.). (See Motion for Order to Cease and Desist.)

^{5/} By order of February 13, 1975, this Court permitted the out-of-time filing in typewritten form of four copies of appellant's brief.

actions undertaken by the Internal Revenue Service to collect a jeopardy assessment of income tax liability. None of the statutory exceptions to the bar of Section 7421(a) are applicable to this jeopardy assessment of income tax liability. Moreover, taxpayer failed to overcome the bar of the statute by establishing that he would suffer irreparable harm unless an injunction issued and that there were no circumstances under which the government could ultimately prevail on its tax claim. Neither the allegations of disruption of business and damage to professional reputation nor the allegation of the unconstitutionality of the progressive income tax are sufficient in this regard. The District Court properly denied taxpayer's motion.

ARGUMENT

SECTION 7421(a) OF THE INTERNAL REVENUE CODE OF 1954 (26 U.S.C.) IS AN ABSOLUTE BAR TO THE RELIEF REQUESTED AND THUS THE DISTRICT COURT PROPERLY DENIED THE MOTION FOR A CEASE AND DESIST ORDER

A. Introduction

Appellant, appearing pro se, asserts that the collection activities of the Internal Revenue Service in this case are "irrational" (Br. 3) and violate the "rules of procedure" of the Internal Revenue Service (Br. 3-4). These claims are based upon taxpayer's allegations that his criminal case, in which he challenged the constitutionality of the progressive income tax, is still pending before the Supreme Court of the United States (Br. 1-3) and that, contrary to a statement in a Notice of Deficiency as to income taxes for the years 1965 through 1968, which he had received from the Internal Revenue Service, that no deficiencies could be assessed against him if he timely filed a petition for a redetermination of the deficiencies with the United States Tax Court, the Internal Revenue Service has made a jeopardy assessment of income tax liability and begun collection activity despite the fact that he has filed a petition for a redetermination of deficiencies with the Tax Court (Br. 3-4). For these reasons, taxpayer implicitly asserts that the District Court erred in denying

6/
his motion for a cease and desist order. Setting aside all
7/
other questions, it is clear that the relief requested by
taxpayer's motion is barred by Section 7421(a) of the Internal
Revenue Code of 1954 (26 U.S.C.) and thus the District Court
properly denied taxpayer's motion.

Section 7421(a) of the Internal Revenue Code of 1954
(26 U.S.C.) provides as follows:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN
ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal
Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125].
Tax. --Except as provided in sections 6212(a) and
(c), 6213(a), and 7426(a) and (b)(1), no suit
for the purpose of restraining the assessment
or collection of any tax shall be maintained in
any court by any person, whether or not such
person is the person against whom such tax was
assessed.

* * *

Here, taxpayer sought to restrain the collection of income
tax deficiencies assessed against him. Accordingly, the
requested relief was precluded by Section 7421(a), unless
taxpayer established that his case came within one of the
exceptions specified in the statute or within the narrow

6/ Appellant, rather than requesting this Court to reverse the
order of the District Court denying his motion, asks this
Court to issue an order directing the Internal Revenue Service
to cease its collection activities, to lift the liens and to
return all monies levied upon. (See Br. 4.)

7/ Thus, there is no need in this case to reach such questions
as whether this action was improperly filed as a motion in
the criminal proceedings, whether the proper party was named
as a defendant (see Sections 6321 and 6331 of the Internal
Revenue Code of 1954 (26 U.S.C.)) or whether this action is
barred by the doctrine of sovereign immunity.

exception which the courts have recognized to the seemingly absolute prohibition of the statute. This he did not do.

B. Taxpayer's action does not fall within any of the statutory exceptions to Section 7421(a)

None of the exceptions specified in Section 7421(a) are applicable to this case. The exception based upon Section 7426 is inapplicable as that section deals only with civil actions by persons other than the person against whom is assessed the tax out of which the challenged levy arose. Here, of course, appellant is the person against whom the tax was assessed. Reliance upon the exception predicated upon Section 6212(a) and (c) is also inappropriate. Section 6212(c) of the Code (26 U.S.C.) only prohibits the Secretary of the Treasury or his delegate from determining any additional deficiency of, inter alia, income tax after having mailed a notice of deficiency to the taxpayer and while a petition for redetermination of the deficiency is pending before the Tax Court. Here, there have been no allegations that additional deficiencies have been determined.
^{8/}

Finally, the exception to the prohibition of Section 7421(a) based upon the provisions of Section 6213(a) of the Code (26 U.S.C.) similarly has no application to this case.

^{8/} Moreover, Section 6212(c) is expressly inapplicable to jeopardy assessments, such as that here.

That section prohibits generally the making of an assessment of deficiency and the undertaking of activities for its collection "until such notice [notice of deficiency] has been mailed to the taxpayer, nor until the expiration of * * * [the time within which a petition for redetermination of the deficiency may be filed with the Tax Court], nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final." It is this provision which taxpayer seemingly relies upon in asserting that the Internal Revenue Service has violated "its own rules of procedure." (Br. 3.) The difficulty with this position, however, is that Section 6213(a) specifically provides that the restrictions imposed on the assessment and collection of taxes are subject to the provisions of Section 6861 of the Code (26 U.S.C.). Section 6861(a) provides as follows:

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME,
ESTATE, AND GIFT TAXES.

(a) Authority for Making.-- If the Secretary [Secretary of Treasury] or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency * * *, and notice and demand shall be made by the Secretary or his delegate for the payment thereof. (Emphasis added.)

*

*

*

The assessment to which taxpayer's motion in this case was directed was a jeopardy assessment (see App. 18, Br. 2) and was therefore not subject to the limitations imposed

by Section 6213(a). See, e.g., Westgate-California Corp. v. United States, 496 F. 2d 839, 842 (C.A. 9, 1974); Sherman v. Nash, 488 F. 2d 1031, 1083-1084 (C.A. 3, 1973). Taxpayer's claim that the Internal Revenue Service has violated "its own rules of procedure" (Br. 3) because of the assessment and collection of taxes during the pendency of the Tax Court proceedings is thus without statutory support.

Clearly, taxpayer's case does not fall within any of the statutory exceptions to Section 7421(a) and the District Court properly denied the requested relief unless taxpayer established that his claim fell within the judicially recognized exception to Section 7421(a).

C. Taxpayer did not establish that he would suffer irreparable harm unless an injunction issued and that the Government could not ultimately establish its claim

Despite the seemingly absolute bar of Section 7421(a), the Supreme Court has held that an attempted collection of taxes may be enjoined if the plaintiff establishes that there are no circumstances under which the Government can ultimately prevail on the tax claim and that he will suffer irreparable injury unless an injunction issues. See, e.g., Enochs v. Williams Packing Co., 370 U.S. 1, 6-7 (1962); Bob Jones University v. Simon, 416 U.S. 725, 737 (1974); Alexander v. "Americans United" Inc., 416 U.S. 752, 758 (1974).

Taxpayer here failed to meet either requirement.

9/ It is clear that, except for the statutory exceptions, a taxpayer can avoid the bar of the statute only by making this showing, as there are no other situations giving rise to an exception to the clear terms of the statute. Bob Jones University v. Simon, supra, p. 742.

The only portions of taxpayer's motion which can be construed as allegations of harm are his claims that the levy upon his checking accounts makes "it impossible for * * * [him] to conduct business and pay his creditors by use of said accounts" and that the collection activities "seriously disrupt the conduct of business * * *, and are detrimental to * * * [his] professional standing in the community in which he practices his profession." (Motion for Order to Cease and Desist.) Setting aside the insufficiency of such conclusory allegations to establish the fact of harm to the taxpayer (see Cole v. Cardoza, 441 F. 2d 1337, 1342 (C.A. 6, 1971)), it is clear that neither statement amounts to an assertion of irreparable harm. Thus, the mere fact that taxpayer cannot use his checking accounts to conduct his business or pay his creditors does not establish that he cannot conduct his business at all^{10/} or that his business will be irreparably destroyed. Further, we fail to see how the fact of a civil tax dispute between a citizen and the Government is detrimental to the citizen's professional standing. And, this claim takes on a shade of the frivolous in light of taxpayer's earlier guilty plea to a charge of income tax evasion. In any event, the opportunity to petition the Tax Court for relief, which relief taxpayer is now seeking, constitutes an adequate remedy

^{10/} Indeed, the motion itself concedes that the conduct of business is possible despite the collection activities when it states that those activities only "seriously disrupt the conduct of business."

at law for the resolution of the tax claims here and thus undercuts any claim of irreparable harm. Bob Jones University v. Simon, supra, pp. 746-748. Clearly, taxpayer's motion was insufficient to establish that he would suffer irreparable harm unless an injunction issued.

The motion similarly was insufficient to establish that there were no circumstances under which the Government could ultimately prevail on its tax claim. Taxpayer in this action does not challenge the method by which the deficiency was computed. Compare Pizzarello v. United States, 408 F. 2d 579, 583 (C.A. 2, 1969). Rather, he asserts that he has petitioned the United States Supreme Court for a writ of certiorari in a case in which he has challenged the unconstitutionality of the progressive income tax. (Br. 1-3; Motion for Order to Cease and Desist, p. 1.) A suit, however, may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it. Dodge v. Osborn, 240 U.S. 118, 121 (1916). Such claims are "premature" in an injunctive action. Bob Jones University v. Simon, supra, pp. 740-741. In any event, the assertion in

II/ At the pages cited, the Supreme Court in Bob Jones University noted that on the same day that the Court held in Bailey v. George, 259 U.S. 16 (1922), that the Anti-Injunction Act (present Section 7421(a)) prohibited a pre-enforcement suit to enjoin the federal Child Labor Tax on the ground that the tax was a regulatory measure beyond the taxing power of Congress, the Court announced Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922), a tax refund case, striking down the tax as unconstitutional.

the motion hardly establishes that the Government cannot ultimately establish its tax claim. Thus, in addition to the fact that taxpayer has lost on this claim of unconstitutionality on two previous occasions in his criminal case, the Supreme Court long ago rejected a claim that a progressive tax is unconstitutional in Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916). It is therefore not "apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim" (Enochs v. Williams Packing Co., supra, p. 7) and taxpayer's motion thus failed to establish the inability of the United States to prevail.

In short, taxpayer's motion was totally insufficient to establish that his claim for an injunction came within the judicially-recognized exception to Section 7421(a).

D. Conclusion

Taxpayer did not establish that the facts of this case fell within either the statutory exceptions or the judicial exception to the prohibition of Section 7421(a) of the Code to suits seeking to restrain the assessment or collection of any tax and thus the District Court properly relied upon Section 7421(a) in denying taxpayer's motion for an order directing the Internal Revenue Service to cease its collection activities.

CONCLUSION

For the foregoing reasons, the order of the District Court should be affirmed.

Respectfully submitted,
Scott P. Crampton
SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
CROMBIE J.D. GARRETT,
ROBERT E. LINDSAY,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

JAMES M. SULLIVAN, JR.,
United States Attorney.

JAMES E. CULLUM,
Assistant United States Attorney.

MARCH, 1975.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on appellant, appearing pro se, by mailing two typewritten copies thereof on this 14th day of March, 1975, in an envelope, with postage prepaid, properly addressed to him as follows:

Peter Terzian
271 Saratoga Road
Scotia, New York

Gilbert E. Andrews
GILBERT E. ANDREWS, att.
Attorney.

APPENDIX

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT 72-CR 103

D. C. Form No. 100 Rev.

DATE	PROCEEDINGS
1972 Mar 28	Filed Indictment-26:7201-filing false income tax returns 4 cts
May 16	Filed waiver of counsel
	Filed bail form
May 15	Defendant is arraigned and pleads not guilty. 10 days to file motions against Indictment. Signed bail form. Released on own recognizance.
May 23	Filed motion to dismiss
Aug 3	Filed brief for defendant
Sept 18	Filed Memorandum of Law-Govt
Sept 18	Motion to dismiss-denied
Sept 20	Filed Judge Policy's order denying dismissing Indictment
Sept 21	Defendant withdraws plea of not guilty and pleads guilty to count four. Pre-sentence investigation ordered. Sentence deferred. Released on own recognizance
Nov 30	Filed deft's notice of claim of mistrial-motion to withdraw plea of guilty Filed Judge Port's memorandum-decision and order denying motion to withdraw plea of guilty.
1978 Jan 22	Defendant withdraws plea of guilty and pleads Not Guilty. Continued on own recognizance. This case is to be placed on Feb 1st at Utica
Feb 1	Filed Notice of appeal of Judge Policy's denying dismissing- Sent docket entries, copy of appeal to US Court of Appeals, copy to US Atty

72-CR 103

DATE	PROCEEDINGS
Feb 14, 73	Sent Certified Copy of Record on Appeal to CCA, Second Circuit
Mar 5	Filed receipt of Court of Appeals of papers
Mar 19	Defendant withdraws plea of not guilty and pleads guilty to count four. Pre-sentence investigation ordered. Sentence deferred. Continued on own recognizance.
Mar 30 Apr 2	Filed Court of Appeals decision dismissing appeal for lack of jurisdiction. The Court advised the defendant of his right to speak in his own behalf, defendant spoke. Defendant is sentenced to be confined in any institution designated by the Attorney General for a period of six months on count four, and sentenced to pay a fine of \$5,000, and stand committed until paid. JIT Counts 1, 2, 3 are dismissed, on motion of B Mumford, Asst US Atty. Remanded to custody of Marshal. \$3
Feb 12	Filed receipt from USCA-notifying papers to be filed on or before Mar 21, 1973
Apr 3	Filed statement of deft to Judge
Apr 3	Filed Judgment-2 copies Marshal's office
Apr 11	Filed Notice of Appeal
Apr 12	Sent docket entries and copy of Notice of Appeal to A. Daniel Fusaro, copy of N&A to U. S. Attorney
Apr 16	Filed Commitment, ex Apr 11, 1973-FPC, Allenwood, Pa
June 6	Sent Certified copy of Record on Appeal to CCA 2nd Cir.
June 7	Recd papers from Court of Appeals, -1st appeal
June 13	Filed receipt of certified Index from Fusaro
July 30	Filed copy of request for 5 days leave addressed to Judge Henry Kaufman, of USCA
Aug. 13	Filed Copy of Motion to Postpone oral argument in U.S.C.A.
Aug. 16	Filed decision of Circuit Court of Appeals to postpone oral argument.
Oct 5	Filed cert copy of Judgment of CCA affirming decision
Oct 5	Filed Notice of Appeal for Supreme Court,
	Sent copy to Supreme Court, notice was sent to Mumford
	Filed cert of mail of appeal to Mumford
Nov. 8	Sent Certified Copy of Record on Appeal to U. S. Supreme Court
Nov. 16 an 21	Filed receipt of Supreme Court for papers Recd all papers from US Supreme Court
Oct. 7. /15/74	Filed Motion for Order to Cease and Desist Filed Notice of Motion, returnable Nov. 4, 1974 at Albany
11/4/74	Motion for Order to Cease & Desist, by deft. - Motion denied. Gov't to submit order.
11/11/74	Filed Notice of Appeal from judgment of denial of his Motion for an Order to Cease & Desist.
11/4	Filed Affidavit signed by James E. Cullum, AUSA in opposition to defendant's motion for an Order to Cease and Desist
11/12	Filed Order denying motion to cease and desist
Dec. 13 12/19/74	Sent Certified copy of Record on Appeal to CCA, 2nd Cir. Filed receipt from CCA, 2nd Cir. for papers sent there.
1/13/75	Filed copy of Appellant's Brief.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

CR. NO. 72-CR-103

vs.

PETER TERZIAN

STATE OF NEW YORK } SS:
COUNTY OF ALBANY }

JAMES E. CULLUM, being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney in and for the Northern District of New York.
2. That this Affidavit is submitted in opposition to the defendant's motion for an Order to Cease and Desist returnable on November 4, 1974.
3. Upon information and belief that the defendant has heretofore filed a petition with the Tax Court for redetermination of a tax deficiency and that said proceeding is still pending.
4. That Title 26, United States Code, Section 7422 states the following:

"(e) . . . if the taxpayer files a petition with the Tax Court, the District Court or the Court of Claims, as the case may be, shall lose jurisdiction of the taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court or the subject matter of the taxpayer's suit or refund."

5. That Title 26, United States Code, Section 7421 states in pertinent part:

"(a) Tax - Except as provided in Sections . . . 6213(a) . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in a court by any person, whether or not such person is the person against whom such tax was assessed."

6. That Title 26, United States Code, Section 6213 restricts assessments against taxpayers while a Tax Court proceeding is in effect and permits taxpayers to bring an action to enjoin such assessments.

[- 2 -]

7. That Jeopardy assessments as authorized by Title 26, United States Code, Section 6861, are exceptions to the restrictions imposed by Title 26, United States Code, Section 6213, as hereinabove mentioned, and that this exception is specifically set forth in Title 26, United States Code, Section 6861.

8. Upon information and belief that a Jeopardy assessment as authorized by Title 26, United States Code, Section 6861, has heretofore been made against this taxpayer and is the subject of his motion herein.

9. That the motion herein has no relationship and is immaterial to criminal case No. 72-CR-103.

WHEREFORE, because this court has no jurisdiction over the subject matter of the motion herein or because this matter is actually an injunctive suit which has not been properly commenced and which has no merit, the defendant's request for relief should in all respects be denied.

Re James E. Cullen

Sworn to before me this
1st day of November, 1974.

151 Sandia Schillinger Harker
NOTARY PUBLIC